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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-909

J. HOWARD SMITH, INC., J. H. BAKER & BRO. INC., WILBUR ELLIS COMPANY, INTERNATIONAL PROTEINS CORP., CARGLL, INC. and GLOUCESTER BY-PRODUCTS INC.,

Petitioners,

v.

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 25, 1974 as modified on rehearing by order entered September 3, 1974.

Opinions Below

The opinion of the District Court of the Southern District of New York has not been officially reported. It is printed in Appendix A hereto.

The opinion of the Court of Appeals as modified is reported at 501 F. 2nd 1275. It is printed in Appendix B hereto. The order of the Court of Appeals modifying its opinion on rehearing is printed at Appendix D hereto. The subsequent further modification of the opinion is also printed at Appendix D.

The order of the Court of Appeals denying rehearing in banc is printed at Appendix E hereto.

Jurisdiction

The jurisdiction of the District Court was invoked pursuant to the Judiciary Act, 28 U.S.C. Sec. 1333 which provides that district courts shall have original jurisdiction of any civil case of admiralty or maritime jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was made and entered July 25, 1974. The order of the Court of Appeals modifying its decision was made and entered September 3, 1974. Pending determination by the Court of Appeals of petitioners' application for a rehearing in banc, this court by order of Justice Thurgood Marshall dated Nov. 20, 1974 (printed at Appendix F) extended petitioners' time to petition for a writ of certiorari to January 1, 1975 and by further order of this court dated December 23, 1974 (printed at Appendix F), petitioners' time to petition for a writ of certiorari was extended to January 31, 1974. The Court of Appeals by order dated Dec. 24, 1974 denied petitioners' application for a rehearing in banc. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

1. In a case where goods in apparent good order and condition upon shipment are delivered in damaged condition, will the cargo owner be deprived of the *prima facie* effect afforded to the clean bill of lading as provided for by 46 U.S.C. 1303(4) and the cases decided thereunder in the following instances:

   a. Where it was *exceedingly probable* that the damage was due to an inherent defect or vice of the goods.

   b. Where the damage to the goods *may* be caused by an inherent defect or vice of the goods.

(c) Where the goods are of an *unstable* nature even if the damage was from an external cause.

(d) In no event until the carrier first establishes that the damage arose from an excepted cause under 46 U.S.C. 1304(2)(a) to (q).

2. Has a carrier, who having demanded, received and relied upon a certificate as to the condition of a certain shipment upon delivery to the vessel for carriage exercised due diligence to furnish a seaworthy vessel as to subsequently received cargoes, when it believes or urges that the certificate is incompetent to prove the shipment's actual good order and condition.

3. Do the provisions of 46 U.S.C. 182 and 46 U.S.C. 1304(2)(b) which exempt a carrier from liability excuse the carrier from exercising all reasonable efforts to prevent aggravation of damage upon discovery of the dangerous condition of a cargo, and also excuse the carrier from exercising all reasonable efforts to prevent damage to other cargoes.

4. Is the clearly erroneous doctrine as provided for in Federal Rules of Civil Procedure, Rule 52a applicable to a determination of negligence or to findings in a case in which the testimony and other evidence is substantially in documentary form, particularly where the trial court has made a finding of fact which is inconsistent with a fact which the parties have stipulated to in their pre-trial order.

Statutes Involved

28 U.S.C. 1254(1)	See	Appendix	G
28 U.S.C. 1333	"	"	"
46 U.S.C. 182	"	"	"
46 U.S.C. 1303	"	"	"
46 U.S.C. 1304	"	"	"
Federal Rules of Civil Procedure Rule 52(a)	"	"	"

Statement

The suit was brought by petitioners who were consignees of sixteen shipments of fishmeal which were loaded on board the S.S. MARANON at the Peruvian ports of Matarani, Callao, Huacho and Chancay (Pl. Ex. 1-7 Bills of Lading; Pl. Ex. 2-9 Bills of Lading 56a line 8 to 57a line 20).[1] The cargoes were destined for Baltimore. The respondent was fully familiar with the nature of the cargo. Accordingly, preshipment certificates showing the temperature, fat and moisture content, as well as the duration of pre-shipment storage were required for shipment. The respondent had had recent experience with the potential problems in the carriage of such cargoes, for a year earlier one of its vessels, the M.V. PUTUMAYO had had a fire in a cargo of fishmeal at the Canal Zone (434-441 Pl. Ex. 14). Indeed fishmeal is a principal export of Peru and the master of the MARANON had carried an infinite amount of such cargo (46 lines 3-22).

A certificate attesting to the pre-shipment ranges of temperature, fat and moisture content and pre-shipment storage of the Matarani cargo was delivered to the vessel at that port (58 lines 2-7; 443 Pl. Ex. 15). The vessel also obtained a similar certificate which was referred to in the Lawson survey report prepared at the request of respondent's agents (355 Pl. Ex. 10). It is not disputed that a "clean" bill of lading was issued by respondent for this cargo (351 Pl. Ex. 1) and "clean" bills of lading were also issued for each of the other cargoes taken on board at the subsequent ports. After the vessel departed from the last

1. References to pages in the Appendix on Appeal are designated by letter "a" following the page number. References to the Exhibit Volume are by page number alone.

port of loading and before she reached Balboa at the southern entrance of the Panama Canal overheating and fires were discovered by the ship's officers in the cargo which was loaded at Matarani, facts which were borne out by the respondent's records and to which the parties stipulated. (374 Pl. Ex. 11 log entry; 465 Def. Ex. A-1 Master's Radio Message; 466 Def. Ex. B-1 Master's Radio Message; 467 Def. Ex. C-1 Master's Radio Message; 468 Def. Ex. D-1 Master's Radio Message; 383 Pl. Ex. 12 Master's Protest; 25a Pre-Trial Order Stipulation). It is obvious from the decisions of the lower courts, both of which found that the fires first occurred after the vessel left the Canal Zone rather than before it arrived at the Canal, that the courts disregarded the records of the respondent and the stipulation of the parties. Upon arrival at Balboa the agent of the vessel's owners conferred with the ship's master who advised the agent that damage had occurred in the ship's main engine and that there had been overheating in the cargo; he denied however having had any fires (471 Def. Ex. F). The agent advised the owners of the condition of the cargo and also of the engine damage. The owners then instructed the master via the agent to protest the engine damage. He did so (462 Pl. Ex. 20-a) and at the same time filed a protest regarding the fires on board the vessel prior to reaching Balboa (383 Pl. Ex. 12). While in the Canal Zone and after an exchange of numerous communications concerning the condition of the cargo, the engine damage and the crew's demand for triple time for handling cargo (469, 470 Def. Ex. E-1; 471 Def. Ex. F; 472-474 Def. Ex. G-1; 475 Def. Ex. H; 476 Def. Ex. I-1; 477, 478 Def. Ex. J-1; 479, 480 Def. Ex. K-1; 481-483 Def. Ex. L-1) among the respondent, its agents and the master, the respondent directed the master to proceed to

the original port of destination, Baltimore. In accordance with those instructions at 8:00 o'clock in the evening of May 14, 1965, the vessel left Cristobal which is at the northern end of the Panama Canal (377 Pl. Ex. 11 Log). When the vessel had proceeded but one hour from that port renewed overheating was discovered in the cargo. The master radioed the vessel's owners informing them of this new occurrence (454 Pl. Ex. 18-b). Then at 8:00 o'clock in the morning of the following day the master radioed the respondent regarding another fire which had been discovered an hour earlier (455 Pl. Ex. 18b message 080015). Later, the same day he again radioed reporting the continuance of the fires and requested instructions (455 Pl. Ex. 18b Message 12015). Further messages were sent by the master to the owners on May 16, 17, and 18 (455-457 Pl. Ex. 18b; 485-490 Def. Ex. M-1). Finally, on May 18th, the vessel diverted to Savannah (491 Def. Ex. M-1) where the fire was extinguished by flooding the cargo holds. The voyage was abandoned and general average was declared by the owners. At no time during the voyage was any attempt made to control the overheating and fires other than by the shifting, and some jettisoning of cargo. The fire fighting equipment on the vessel which consisted of a CO_2 system (58a line 25 to 59a line 9) was never employed (48a Dist. Ct. Ap.). The District Court held for respondent on the ground that the provisions of the Carriage of Goods by Sea Act 46 U.S.C. Sec. 1304(2)(b) and of 46 U.S.C. Sec. 182 (generally referred to as the "Fire Statute") exempted the respondent from liability. In reaching its decision, the court found that the respondent (owner) was not at fault or in privity to the fires. Upon affirming the District Court, the Court of Appeals held that the conclusion of the lower court that the master re-

tained control of the ship was not clearly erroneous. Both lower courts have accepted the fact that the overheating and fires originated in the fishmeal which was loaded at Matarani, the first port of call. The District Court held that because of the nature of the cargo, the burden was on petitioners to establish the good order and condition of each cargo when it was delivered to the ship. The bills of lading, all of which were put in evidence, were held to be insufficient to establish such condition, although there was no proof that the overheating and fires were occasioned by an inherent vice in the cargo. Furthermore, it was not questioned that the cause of the damage to the fifteen non-Matarani shipments was the fire and overheating which had originated in the Matarani shipment. The District Court found the stowage and ventilation of the cargoes was adequate. The Court of Appeals affirmed these findings as not clearly erroneous. The Court of Appeals noted that the stowage though not perfect, reasonably complied with the accepted method of stowing such cargoes. The respondent's log book did not confirm the master's testimony that he continuously ventilated the cargo. On the contrary it showed no ventilation from April 25 when fishmeal loading commenced at Matarani (357 Pl. Ex. 11) until May 3rd at 4:00 A.M. (365 Pl. Ex. 11). Thereafter, no ventilation was recorded until May 9th at 6:00 A.M. (371 Pl. Ex. 11). Regular entries for ventilation were made in the ship's log thereafter (372-374 Pl. Ex. 11). Conversely the ship's logs report fires on May 12th and the master denied the existence of such fires. Neither of the lower courts made any finding as to whether or not the vessel's owners and/or the master were negligent in proceeding with the voyage with a damaged engine and carrying a cargo, part of which was in an unstable condition. Nor did either court make a finding as to whether or not the respondent and/or the

master were negligent in continuing the voyage to Baltimore instead of returning to Panama after further overheating, followed by new fires, was discovered within hours after sailing from that port. In its opinion the Court of Appeals suggested that petitioners had abandoned their argument that the vessel should not have proceeded with its engine in a damaged condition. On its petition for rehearing petitioners denied having done so. The District Court found that the master was not negligent in failing to use the CO_2 (the only fire fighting system on the vessel) because it might damage the cargo, and the Court of Appeals affirmed on the ground that the finding was not clearly erroneous. This finding was unsupported by the only evidence in this connection for the witness stated that CO_2 might cause condensation if improperly used (114a line 6 to 115a line 17). The master made no reference to condensation as a factor to be considered in employing CO_2. When asked why he didn't use the system he said it was because the holds were open and CO_2 is ineffective unless you close the holds (252 lines 1-7). The reason that he couldn't close the holds was because the hatch covers were being used to protect the damaged cargo that had been removed from the holds to the deck at the Canal Zone (255 lines 4-18; 258 lines 3-19).

Both lower courts held that the respondent was entitled to general average contribution from cargo. The District Court's conclusion was not supported by a necessary preliminary finding that neither the respondent nor its agents or employees were at fault with respect to the cargo damage. In an addendum to the decision filed after petitioners had applied for a rehearing and suggested that it be heard in banc, the Court of Appeals said that since there was testimony that the conduct of the captain and the crew mini-

mized the damage, it could not conclude that the lower court's finding was clearly erroneous. In making this additional finding upon which the affirmance was based, the Court of Appeals overlooked the fact that the testimony it relied upon related to crew activity which took place at Savannah, the port of refuge, rather than to activity which took place during the voyage prior to arrival at that port. (Comments in report of surveyor Wiley based upon his observation of the crew at Savannah Pl. Ex. 12—pp. 13-14 not reproduced in Exhibit Volume).

Except for the testimony of experts, substantially all of the evidence in this case was in the form of depositions and documents.

Reasons for Granting the Writ

During the course of the development in the Second Circuit of the rule of maritime law which is the subject of this petition, this Court has denied petitions for writs of certiorari in cases which raised the question of the propriety of that rule. The rule has now been given final expression in the decision of the Court of Appeals which is the subject of this petition, and its application places a construction on the Carriage of Goods by Sea Act which is inimical to the scheme and purpose of that Act. This decision makes a fundamental change that undermines the basic concepts of the law of admiralty and renders meaningless certain provisions that are essential to the structure of the Carriage of Goods by Sea Act. In view of the numerous and conflicting opinions as to the proper law to be applied, unless this court now resolves the confusion which has been engendered and states with finality the construction to be given to the Act, the continued lack of uniformity and the disruptive effect that the decision from which

petitioners seek to appeal will place maritime law in complete disarray that will have far reaching repercussions in international ocean commerce.

1. The lower courts have held that because the goods which constituted the cargoes were susceptible to an inherent vice, it was incumbent upon petitioners as part of their case to establish by evidence, independent of the "clean" bills of lading which were received from the carrier, that their respective cargoes were in good order and condition at the time of shipment regardless of whether there was any evidence that the damage which occurred during the voyage was in fact attributable to such vice. The Court of Appeals has specifically held that failure to offer such proof barred recovery by all petitioners including those whose cargoes were admittedly damaged by external causes. This holding represents the final step in the development of a rule which has been formulated by the courts in the Second Circuit. It was first expressed in *The Niel Maersk* 91 F. 2nd 932 (2nd Cir. 1937), cert. denied 302 U.S. 753, 58 S. Ct. 281, 82 L. Ed. 582. In that case the court found that damage to cargo was caused partly by an inherent vice which most probably existed in the cargo prior to shipment for which the carrier would not be liable, and partly by the carrier's negligence. It was held that before an apportionment of damages would be made, the shipper would have to prove the actual condition of the cargo at the time that it was received by the carrier. The Court was of the opinion that since the preshipment condition arose while the shipper had custody of the goods, he should be required to show the actual condition at the time of shipment, and on this basis the court distinguished the case from *Schnell* v. *The Vallescura* 293 U.S. 296, 55 S. Ct. 194, 79 L. Ed. 373 (1934). THE VALLESCURA also involved the problem of apportioning damages, however, in that case the carrier had custody of

the cargo when both of the contributing causes arose, that is, peril of the sea, for which the carrier was not responsible, and negligence for which the carrier was liable. In that case this court outlined the rules of maritime law governing cases which involve cargo loss or damage. In summary those rules provide that a shipper establishes his *prima facie* case by proving that goods delivered to the carrier in good order were outturned damaged. The carrier to avoid liability must then prove either that the damage resulted from an "excepted" cause for which it would not be responsible or that it exercised due diligence to prevent the harm. If the carrier establishes that the immediate cause of the damage was one of the "excepted" causes, the burden is then on the shipper to give evidence that the carrier was negligent. Where, however, both an "excepted" cause and the carrier's negligence contributed to the damage it is the carrier's obligation to apportion the damage between the two causes and failing to do so, the carrier will be held liable for the entire loss. Both THE NIEL MAERSK and THE VALLESCURA involved cases which arose before the enactment of the Carriage of Goods By Sea Act (hereinafter referred to as COGSA) 46 U.S.C. Section 1300 *et. seq.* (enacted 1936). The general scheme of COGSA followed the maritime law as outlined in THE VALLESCURA with the further provision that a bill of lading shall be *prima facie* evidence of the order and condition of the goods at the time of shipment. 46 U.S.C. Section 1303(4).

In 1947 the District Court for the Southern District of New York was again presented with a case involving damage to cargo arising from two causes, that is, inherent vice of the cargo and negligence of the carrier. *American Tobacco Company* v. *Katingo Hadjipatera* 81 F. Supp. 438, modified and affirmed 194 F. 2nd 449 (2nd Cir. 1951).

cert. denied 343 U.S. 978, 72 S. Ct. 1076, 96 L. Ed. 1370. However, unlike THE NIEL MAERSK, the case involved more than one cargo. The court found that the damage to the several shipments was attributable to the condition of a particular shipment in which the damage originated and that the condition existed at the time it was received by the carrier for shipment. As to that cargo the court applied the holding in THE NIEL MAERSK and barred recovery because of the shipper's failure to prove the actual condition of that cargo but the court refused to extend that holding to the other cargoes as to which it found the bills of lading sufficient to establish the shippers' *prima facie* case. The court then proceeded to make the following observations at page 446:

> "The Supreme Court has said that the carrier by sea who delivers in bad condition cargo that he had received in good condition has the burden of establishing every exception to his general liability: *Schnell* v. *The Vallescura* 1934, 293 U.S. 296, 55 S. Ct. 194, 79 L. Ed. 373. The weight of this burden was moderated when certiorari was denied, 1937, 302 U.S. 753, 58 S. Ct. 281, 82 L. Ed. 582, to review the Niel Maersk, 2 Cir. 1937, 91 F. 2d 932, in which it was held that the shipper must affirmatively establish the good condition at time of shipment of goods damaged by heating, where the carrier claimed the cause to have been inherent vice. This would suggest that whenever cargo damage could have been caused by internal defects, the shipper must disprove such defects in order to recover even if the carrier's failure to exercise due diligence in stowing or caring for the cargo may have caused or contributed to the damage: *The Niel Maersk, supra.* Contra *The Nichiyo Maru* 4 Cir. 1937, 89 F. 2d 539."

This broader expression of the rule of THE NIEL MAERSK was neither required by the facts under consideration nor was it supported by the assumed authority which the court found in this court's denial of certiorari in THE NIEL MAERSK. The Supreme Court has repeatedly stated that the denial of certiorari should not be considered as reflecting the views of the court as to the merits of the case or the significance of its holding. Cf. *Maryland* v. *Baltimore Radio Show* 338 U.S. 912, 917-920, 70 S. Ct. 252, 254-55, 94 L. Ed. 562, 565-66. Nevertheless, this interpretation has been accepted by the courts and thus THE KATINGO HADJIPATERA (supra) set the course for the rule which it ascribed to THE NIEL MAERSK. In following these two cases, the rule has been applied where inherent vice or internal defect *may* have been the cause of the damage. *Hecht, Levis & Kahn* v. *S.S. President Buchanan* 236 F. 2nd 627 (2nd Cir. 1956); *Lekas and Drivas Inc.* v. *Goulandris* 306 F. 2nd 426 (2nd Cir. 1962). But the courts have not been unmindful of the significance of the bill of lading. *Karabagui* v. *The Shickshinny* 123 F. Supp. 99, aff'd sub nom. *Kupfermann* v. *United States* 227 F. 2d 348 (2nd Cir. 1955). The courts have been equally concerned with the fact that "excepted" causes for which the carrier was not liable under general maritime law had been incorporated as defenses available to the carrier under COGSA 46 U.S.C. Section 1304(2) (a-p), including inherent defect, quality or vice of the goods 46 U.S. Section 1304(2)(m). In *American Tobacco Company* v. *Goulandris* 173 F. Supp. 140 (S.D.N.Y. 1959), aff'd 281 F. 2nd 179 (2nd Cir. 1960) the Court after referring to THE KATINGO HADJIPATERA and the interpretation which that case placed on THE NIEL MAERSK said at 175:

> "We have concluded that the ultimate burden of establishing that the tobacco cargo was free of in-

herent vice is upon the libelants if the tobacco is shown to have been damaged by heating of internal origin. The respondents have the burden of proving causal connection between an inherent vice and the damage (Section 4(2)(m) of the Act, 46 U.S.C.A. § 1304(2)(m). Thus, if the respondents prove that the heating damage to the tobacco was of internal origin, libelants have the burden of establishing the sound condition of the cargo when delivered to the vessel, i.e. that it was free of 'inherent defect, quality, or vice'. If libelants fail to sustain the burden, the respondents also have the burden of bringing themselves within the exemption of Section 4(2)(m) of the Act, and of establishing that the loss or damage sustained by the cargo arose or resulted from an 'inherent defect, quality or vice.' "

In *Elia Salzman Tobacco Co.* v. *S.S. Mormacwind* 371 F. 2nd 537 (2nd Cir. 1967), the question was posed to the court as to whether *American Tobacco Co.* v. *Goulandris* 173 F. Supp. 140 at 175 (supra) expressed the rule of the Second Circuit. The court at page 539 footnote 2 refused to decide this point on the ground that such a determination was not required in that case. The question has now been answered in the negative by the decision of the Court of Appeals which is the subject of this appeal. In reaching this determination, the court has not only held that it is not necessary for the carrier to prove the causal connection between the "excepted" cause and the damage before the shipper is required to establish the condition of the cargo but has gone further and held that a bill of lading will not be sufficient to establish the shipper's case even if it is demonstrated that the cargo was damaged by external rather than internal causes. In so doing the court has overruled that part of the determination in *American Tobacco*

Co. v. *Katingo Hadjipatera,* (supra) which held that the bill of lading will establish the good order and condition of the goods when the damage resulted from external causes. The present decision effects a fundamental change in a basic rule of maritime law and imposes also a construction on COGSA that completely nullifies the provision in 46 U.S.C. seq. 1303(4) that a bill of lading shall be *prima facie* evidence of the order and condition of the goods at the time of shipment.

2. The rule as propounded by the courts of the Second Circuit has been either rejected or limited in its application by the courts in the following circuits:

Fourth Circuit:

Brown & Williamson Corp. v. *the S.S. Anghyra* 157 F. Supp. 737, mod. on other grounds sub. nom. *Hellenic Lines Ltd.* v. *Brown & Williamson Corp.* 277 F. 2nd 9 (4th Cir. 1960), cert. denied 364 U.S. 879, 81 S. Ct. 168, 5 L. Ed. 2nd 102. The district court stated the rule of the Fourth Circuit to be that where a cargo when loaded on a vessel was in "apparent good order and condition", the burden rests upon the carrier to explain the cause of the damage or in the alternative, to show freedom from negligence citing *The Nichiyo Maru* 89 F. 2nd 539 (4th Cir.) (157 F. Supp. 737 at 748).[2] Then at 749, the court makes reference to the Second Circuit rule and concludes that the theory adopted by that circuit infers that the carrier's burden of proof when it claims that damage comes within the "catch-all" exception of 46 U.S.C. Sec. 1304(2)(q) does not apply to the carrier when the "inherent vice" exception of 46 U.S.C. 1304(2)(m) is involved. See also *Samincorp. South American Min. & Mer. Corp.* v. *S.S.*

2. The Nichiyo Maru is cited improperly in the District Court decision.

Cornwall 240 F. Supp. 327, 329 (D.C. Md. 1963) wherein the District Court reiterated that a conflict exists among circuits with respect to the *prima facie* effect to be given to a clean bill of lading when the carrier contends that cargo damage arose from inherent vice.

Fifth Circuit:

In *United States* v. *Central Gulf Steamship Corporation* 340 F. Supp. 473 (E.D. La. 1972) at 480 the Court discusses the question of the burden of proof under COGSA and concludes that the rule formulated by the decisions of the Second Circuit is not in accord with the decisions in the Fifth Circuit.

Ninth Circuit:

In *States Marine Corp. of Del.* v. *Producers Coop. Packing Co.* 310 F. 2nd 206 (9th Cir. 1962) the Court of Appeals incorporated the opinion of the trial court in its decision. The District Court had held that the shipper may rely on the bill of lading as evidence of the condition of the cargo, unless there is an affirmative showing of inherent vice in the goods which might have caused the damage, or there is no evidence of negligence on the part of the carrier and the possibility of concealed vice in the goods is "very strong." However, when there is evidence of negligence and no substantial evidence to rebut the shipper's *prima facie* showing of good order and condition, the shipper need to go no further. Upon rehearing the Court of Appeals refused to pass on the question of whether the rule of the NIEL MAERSK can be applied in cases where there is evidence of carrier's negligence contributing to or enhancing the damage, citing Knauth on Ocean Bills of Lading (3rd Printing 1947) p. 150 and Gilmore and Black, The Law Of Admiralty p. 151.

3. In the course of evolving its rule the Second Circuit courts have become more concerned with effect (overheating, fire, spoilage, etc.) than with cause (inherent defect or vice). In THE NIEL MAERSK (supra) the court found that the overheating was *most probably* due to the internal condition of the cargo. In *American Tobacco Company* v. *Goulandris* (supra) the Court found that the carrier had exercised due care in handling and stowing the cargo, and that the cargo in which the overheating originated was susceptible to such damage because of its inherent qualities. The courts then extended the application of the rule to cover instances where the damage *may* have been caused by the internal condition of the cargo. However, at no time prior to the present case, did any court indicate that the rule would apply to a shipper whose cargo was shown to have been damaged only by external causes. It is submitted that the better approach to the problem is the one recommended in Gilmore and Black, The Law of Admiralty (1957) 147 Sec. 3-38 and 162 Sec. 3-43. The conclusion of the authors is in conformity with the rules of maritime law as outlined in THE VALLESCURA (supra). See also Carver, Carriage by Sea (12th Ed. 1971) Vol. 1 page 15 Sec. 16.

The decision of the Court of Appeals which is the subject of this petition has set the NIEL MAERSK doctrine as finally evoked on a collision course with other circuits, with the COGSA itself and with respected authors in the maritime field. Ocean carriers invariably plead all the defenses of 46 U.S.C. seq. 1304(2)(a-p). Considering that numerous cargoes of various types must be affected, the need for uniformity in the interpretation of COGSA is imperative. Many of these cargo claims involve substantial amounts. The present case alone concerns a loss of cargo in excess of $200,000.00 and a counterclaim of over $95,000.00. Furthermore, if the decision of the Court of Appeals is permitted to stand, it will undoubtedly have a substantial effect

on the determination of cases involving the order and condition of containerized shipments. This problem has been dealt with to some extent in *Sperry Rand Corp.* v. *Norddeutcher Lloyd* 1973 A.M.C. 1392 (S.D.N.Y. 1973) and *M. Parquet & Co.* v. *Dart Containerline Co. Ltd.* 1973 A.M.C. 926 (Civ. Ct. N.Y. Co. 1973) 74 Misc. 2nd 352, 343 N.Y.S. 2nd 446; see also *Leather's Best Inc.* v. *S.S. Mormaclynx* 313 F. Supp. 1373, 1380 aff'd 451 F. 2nd 800 (2nd Cir. 1971).

It is respectfully submitted that the question presented upon this petition as to the proper rule of maritime law and the construction to be given to COGSA has ripened to a point that requires settlement of the conflict among the Circuits and the formulation of a uniform rule by this Court.

4. If the better approach referred to in point 3 supra had been adopted in the case at bar, the respondent would have been required to show that it had used due diligence in furnishing a seaworthy vessel and that it properly cared for the cargoes, since there was no evidence presented to establish that the overheating and fire in the cargo loaded at the port of Matarani was caused by its inherent vice or defect. The lower courts held that neither the Matarani bill of lading nor the fifteen similar bills of lading subsequently issued by the respondent had any significance. The courts refused to consider the certificate attesting to the condition of the Matarani cargo even though the certificate was required by respondent before it would accept the goods for carriage. Nor was any weight given to the certificate which the respondent itself had obtained and which also certified that the goods were in proper condition for shipment. Yet respondent must have relied on these certificates when the cargoes were received at the subsequnt ports, for there was no other showing that the Matarani cargo was in

a safe condition. Due diligence with respect to the vessel's seaworthiness must be exercised as of the time each cargo is received and the vessel must be seaworthy at such time. *Mississippi Shipping Co.* v. *Zander and Company* 270 F. 2nd 345, 350 (cases cited) (5th Cir. 1959); *The Southwark* 191 U.S. 1, 13, 24 S. Ct. 1, 6, 48 L. Ed. 65, 71 (1903). Seaworthiness requires that the cargo be in a safe condition. *Accinanto, Limited* v. *Cosmopolitan Shipping Co.* 99 F. Supp. 261, 265 (D.C. Md. 1951), modified on other grounds sub. nom. A/S j. *Ludwig Mowinckels Rederi* v. *Accinanto, Limited* 199 F. 2nd 134 (4th Cir. 1952), cert. denied 345 U.S. 992, 73 S. Ct. 1129, 97 L. Ed. 1400; *The Southwark* (supra); *Gutierrez* v. *Waterman Steamship Corp.* 373 U.S. 206, 213, 83 S. Ct. 1185, 1190, 10 L. Ed. 2nd 297, 303 (1963); *Carver, Carriage by Sea* (12th Ed.) Vol. 1 page 95 Sec. 108. If respondent relied on the certificates as justification for receiving the other cargoes without first verifying the actual condition of the Matarani cargo, then respondent cannot at trial reject the certificates as meaningless. *Leather's Best Inc.* v. *S.S. Mormaclynx* 313 F. Supp. 1373 (supra), 1380; *Louisville & Nashville R.R. Co.* v. *Knox Homes Corp.* 343 F. 2nd 887, 896 (5th Cir. 1965). Respondent having previously carried similar cargoes was fully familiar with the properties and propensities of the cargo it was carrying. The master said he was experienced in the care and handling of such cargo and that he had been trained in the use of the CO_2 fire fighting system. There was no evidence of inspection of the cargo after the ship departed from Matarani. There were no entries in the ship's logs of temperature or ventilation (with one exception) until both matters were routinely recorded during the latter stages of the voyage. The absence of a log entry has been taken as proof that an event subsequently reported never in fact occurred. *Nichimen Company* v. *M.V. Farland* 333 F. Supp. 691, aff'd. 462 F. 2nd 319 (2nd Cir. 1972); *Peter Paul, Inc.* v. *The M.S.*

Christer Salen 152 F. Supp. 410, aff'd sub. nom. *Peter Paul, Inc.* v. *Rederi A/B Pulp*, 258 F. 2nd 901 (2nd Cir. 1958), cert. denied 359 U.S. 910, 79 S. Ct. 586, 3 L. Ed. 2nd 574. The master did testify that he started ventilation immediately after loading at Matarani, but he also testified that no fires occurred before the vessel reached the Canal Zone. His own messages as well as his log entries contradict him. Such testimony standing alone does not constitute sufficient evidence that proper precautions were taken to make certain that the ship was in a safe condition at the time the next cargo was loaded. If the lower courts had not relied upon the rule of the Second Circuit, it is clear that respondent had not sustained the burden of proving that the damage was attributable to an inherent condition of the Matarani cargo, or that it had not been negligent in the care of the cargo. *The Vallescura* (supra). There was no more ground for assuming that the overheating and fire was due to the condition of the cargo, than there was to assume that the damage was not caused through the fault of respondent. If the Court of Appeals had not extended the application of THE NIEL MAERSK rule, there was no basis whatsoever for sustaining the trial court's decision as to the fifteen non-Matarani cargoes.

5. The trial court held that respondent was not in control of the vessel at the time the fires occurred and therefore respondent was relieved of liability by the provisions of 46 U.S.C. Sec. 182 and COGSA 46 U.S.C. Sec. 1304(2)(b). The determination was based on the unsupported testimony of the master when he was deposed at a pretrial examination. It cannot be disputed that the master was an interested witness and his testimony standing alone can hardly be considered of sufficient weight to overcome the other evidence which demonstrated that respondent had intervened, and that the master acted only after receiving instructions from respondent. Before the vessel reached Balboa the

master had radioed respondent reporting overheatings and fires in the cargo and requested respondent's instructions. Prior to the vessel's arrival at the port, respondent had also been apprised of the damage to the ship's engine. Respondent directed its agent to investigate. Messages were then exchanged among the master, the agent and respondent which made it clear that the parties concerned understood that the decision as to the procedure to be followed rested with respondent. Then, having full knowledge of the condition of the ship and her cargo, respondent directed the master to resume the voyage to the original port of destination, Baltimore. In view of the position which respondent has taken regarding the certificates which were issued for the Matarani cargo it follows that the respondent had not exercised due diligence to provide a seaworthy vessel as to the subsequently lifted cargoes. The protection of the "Fire Statute" 46 U. S. Sec. 182 and COGSA 46 U. S. C. Sec. 1304 (2) (b) is not available to a carrier which has failed to exercise due diligence to make its vessel seaworthy. *Asbestos Corp. Ltd., et al.*, v. *Compagnie De Navigation Fraissinet Et Cyprien Fabre et al.*, 480 F. 2nd 669, 672 (2 Cir. 1973). The subsequent intervention by respondent at the Canal Zone, and its direction that the voyage be resumed knowing that the vessel could not maintain her speed and that the condition of the cargo presented an imminent danger, also barred respondent from claiming this defense. *May* v. *Hamburg Etc. Gesellschaft* 290 U.S. 333, 346 (1933), 54 S. Ct. 162, 165, 78 L. Ed. 348, 353; *Gesellschaft Fur Getreidhandel A/G* v. *S.S. Texas* 318 F. Supp. 599 (E.D. La. 1970). However, the Court of Appeals refused to set aside the findings of the trial court on the ground that they were not clearly erroneous, although the provisions of the rule, F.R.C.P. 52(a) were not applicable since the evidence presented was substantially in the form of depositions and documents. *J. Gerber & Co.* v. *S.S. Sabine Howaldt* 437 F. 2nd 580 (2 Cir. 1971). If

the Appellate Court had not considered itself bound by that rule, it might well have found that the preponderance of evidence was against respondent.

6. In addition to providing a seaworthy vessel, a carrier is also required to exercise proper care in loading, stowing, carrying and discharging cargo. This obligation under COGSA 46 U. S. C. Sec. 1303 (2) continues throughout the voyage. It includes the prevention of aggravation of damage that has affected cargo, and the protection of other cargo from the peril. *American Mail Line Ltd.* v. *Tokyo Marine Fire and Insurance Co. Ltd.* 270 F. 2nd 499 (9th Cir. 1959); *Asbestos Corp. Ltd. et al.* v. *Compagnie De Navigation Fraissinet Et Cyprien Fabre et al.*, (supra). See also *Propeller Niagara* v. *Cordes* 62 U.S. (21 Howard) 7, 16 L. Ed. 41 (1859); *The Portsmouth* 76 U.S. (9 Wallace) 682, 19 L. Ed 754 (1869); *The Jason* 225 U.S. 32, 54 (1912), 32 S. Ct. 560, 564, 56 L. Ed. 969, 978. *The Guanancita* 69 F. Supp. 928 (S.D. Fla. 1947). Respondent completely failed to meet this obligation. When overheating and fires first occurred in the Matarani cargo, which was given bottom stow since it was the first cargo loaded, the master made no attempt to control the overheating or extinguish the fire with the CO_2 system with which the ship was equipped for that purpose. Instead the master adopted other measures, — measures which ultimately proved disasterous. Again, at the Panama Canal, no efforts were made to stabilize the condition in the cargo or in the alternative, to discharge the dangerous cargo as might have been done. COGSA 46 U.S.C. Sec. 1304(6). Instead respondent directed that the vessel proceed from Cristobal for Baltimore with a defective engine and with the cargo so distributed on the hatch covers, that the CO_2 system could not be effectively employed. Finally, when the vessel was but an hour from Cristobal and overheating occurred, followed by another fire, the vessel did not return to that port but instead continued with the voyage until the vessel had

to be diverted to Savannah where the voyage was abandoned. Considering the fact that the vessel's fire fighting system could not be used when this last overheating and fires happened, respondent was grossly negligent in not returning to Cristobal. Neither of the courts below made a determination with respect to this contention. Under the facts of the case, respondent is liable for the full amount of the loss of the non-Matarani cargoes. It is submitted that if respondent claims that there should be an apportionment of damage as to the Matarani cargo, the respondent has the burden of making such apportionment. *Schnell* v. *Vallescura* (supra). Respondent having failed to show that the fires which originated in the Matarani cargo were at least most probably the result of an inherent vice, the rule of The Niel Maersk does not apply in any event. Respondent should be held liable for the entire loss and by the same token respondent should not be entitled to recover in general average. *The Irrawaddy* 171 U.S. 187, 18 S. Ct. 831, 43 L. Ed. 130 (1898).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

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